

LEGAL ISSUES RAISED BY LT. COL. OLIVER NORTH'S RETIREMENT PAY

OCTOBER 31 (legislative day, SEPTEMBER 18), 1989.—Ordered to be printed

Mr. BIDEN, from the Committee on the Judiciary,
submitted the following

REPORT

together with

ADDITIONAL VIEWS

The Committee on the Judiciary was instructed to study legal issues raised by the termination of Lt. Col. Oliver North's retirement pay. Having considered the same, Senators Biden, Kennedy, Metzenbaum, DeConcini, Leahy, Simon, and Kohl agreed with the position that Congress should not enact legislation concerning Colonel North's retirement pay. Senators Thurmond, Hatch, Simpson, Grassley, Specter, and Humphrey agreed with the position that legislation to restore the retirement pay of Colonel North should be enacted.

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I. POSITION OF SENATORS BIDEN, KENNEDY, METZENBAUM, DECONCINI, LEAHY, SIMON AND KOHL

A. SUMMARY

At the present time, Congress should not enact legislation concerning Colonel North's retirement pay. The current status of this matter in the executive and judicial branches indicates that congressional action would be premature.

A final determination on the status and pay issues raised by Colonel North's pension has not yet been reached by the Department of the Navy. The judiciary has yet to engage in its constitutional role of interpreting and applying the law in question. Because the ultimate resolution of this matter by the executive and judicial branches remains uncertain, congressional intervention may prove unnecessary.

The proper role for Congress is to study the equitable concerns raised by the termination of Colonel North's pension. The General Accounting Office has suggested that the courts may view retired military officers as a special class for purposes of the forfeiture provision of section 2071(b). Whether or not this is the case, the larger issue of equity in the laws governing pension forfeiture should be addressed by Congress. Should Congress determine, after further review, that application of the forfeiture provision of section 2071(b) to retired military officers is inequitable, this problem can best be addressed through general legislation.

B. LEGISLATIVE HISTORY

On May 4, 1989, a jury found Lt. Col. Oliver North, United States Marine Corps (Retired) guilty of violating 18 U.S.C. 2071(b), a statute prohibiting the destruction of government documents. The final clause of Section 2071(b) requires that whoever is convicted "shall forfeit his office and be disqualified from holding any office under the United States."

In deciding whether to continue paying Colonel North's retirement pay, the Judge Advocate General of the Department of the Navy concluded that this forfeiture provision was not intended to apply to retired military officers. The General Counsel of the Navy, however, decided to withhold Colonel North's retirement pay pending receipt of the opinion of GAO on the proper interpretation of section 2071(b).

On July 31, 1989, the GAO General Counsel recommended that the Department of the Navy continue to withhold Colonel North's retirement pay. He concluded that, although interpretation of Section 2071(b) presented a question of first impression that ultimately

would have to be decided in court, there was "serious doubt" that Colonel North continued to be entitled to his retirement pay.

On August 1, 1989, the Senate responded to the decision to withhold Colonel North's retirement pay by instructing the Judiciary Committee to make the following determinations:

1. Whether the legislative intent of 18 U.S.C. 2071(b) was to require the forfeiture and disqualification from "office under the United States" to apply to officers, both active and retired, in the armed forces;
2. Whether the legislative intent of 18 U.S.C. 2071(b) was to deprive persons convicted under this section from receipt of their Federal pensions;
3. Whether 18 U.S.C. 2071(b) applies to other retired government employees, and if not, whether such is equitable;
4. Whether action on any remedial legislation for Lt. Col. Oliver North, relating to the denial of his pension as a result of his conviction under 18 U.S.C. 2071(b) is appropriate in lieu of litigation, or whether it is preferable for this issue to be determined in the courts;
5. Whether remedial legislation for Lt. Col. Oliver North is warranted under the application of 18 U.S.C. 2071(b), considering the opinion of the General Counsel of the General Accounting Office dated July 31, 1989;
6. Whether any other legislation relating to the application of 18 U.S.C. 2071(b) is appropriate.

In accordance with these instructions, on October 18, 1989, the committee held a hearing on the legal issues raised by the termination of Colonel North's retirement pay. The committee heard testimony from constitutional law scholars, as well as the attorneys who provided the initial legal analysis regarding this matter. The witnesses were: Prof. Peter Shane, University of Iowa; Prof. Eugene Hickok, Dickinson College; James Hinchman, General Counsel, General Accounting Office; Lawrence Lamade, General Counsel, Department of the Navy; Admiral E. D. Stumbaugh, Judge Advocate General, Department of the Navy; and Larry Rivers, Executive Director, Veterans of Foreign Wars.

C. DISCUSSION

1. *Passage of a private bill to restore Colonel North's retirement pay is premature when the issue has not yet been addressed by the executive and judicial branches*

- a. *The Department of the Navy has not yet resolved Colonel North's status*

In a July 5, 1989 letter to GAO, the General Counsel of the Navy requested a decision as to "whether [Colonel North] may continue to receive pay and other benefits as a retired regular officer." The recommendation of the General Counsel of GAO that Colonel North's retirement pay continue to be withheld rested on the legal conclusion that, despite his retired status, Colonel North continued to hold an office under the United States, at least for some purposes. For this reason, the General Counsel advised that a court

would be likely to find that section 2071(b) applies to Colonel North and requires the forfeiture of his office and retirement pay.

In accordance with this opinion, the Department of the Navy has continued to withhold Colonel North's retirement pay. However, the authority of the General Accounting Office extends only to matters concerning pay. The question of Colonel North's status and whether he should remain on the Navy's rolls as a retired officer is within the jurisdiction of the Department of the Navy. In the absence of a more authoritative judgment, the Navy has abided by the opinion of the Judge Advocate General and continues to consider Oliver North to be a retired officer of the Marine Corps.

There is a need for a ruling in this matter that will unify the initial decisions regarding pay and status. At present, the executive branch's response to Colonel North's conviction under section 2071(b) is incomplete. Legislation ordering the Navy to pay Colonel North's pension is thus premature. In his testimony, Admiral Stumbaugh, Judge Advocate General of the Navy, suggested the need for further clarification from the executive branch:

I am not sure the executive department has made any determination, other than the status. I think the Secretary of the Navy can make the determination of the status. . . . The Comptroller General makes the determination as to pay. Now, obviously, he has to look at the status issue in determining whether the pay should be made. If those two gentlemen disagree, I do not think one necessarily overrides the other. . . . So I am not sure that we have a final determination. (Testimony of Admiral Stumbaugh, October 18, 1989, at 68.)

Congress should not intervene in this matter until the Department of the Navy has had sufficient opportunity to formulate a comprehensive response to the difficult issues raised by Colonel North's pension. The Navy is in the best position to anticipate the consequences of a particular ruling on the status of retired officers and to select a course of action that is consistent with the needs of the military.

If possible, congressional interference in the daily operations of the Navy should be avoided. Since the Navy has not yet reached a final determination in this matter, it is inappropriate for Congress to intervene.

b. The Federal courts have not yet interpreted the law

Once the Navy makes a final ruling, a judicial determination is the most appropriate means, and the next logical step, for resolution of the legal issues surrounding Colonel North's pension. The GAO General Counsel reflected this opinion in the following statement:

The denial of payment gives Colonel North the right to sue for it. Should he do so, he and the government will obtain from the federal courts a conclusive determination of whether he is entitled to continue to be paid as a retired regular officer of the Marine Corps. (Letter of July 31, 1989, from James Hinchman to Lawrence Lamade, at 3.)

The formal legal opinions regarding Colonel North's retirement pay disagree as to the intent of section 2071(b); obviously, there are serious difficulties involved in interpreting the statute. First, Colonel North's entitlement to his retirement pay presents a legal question of first impression; no prior case has been decided that explains the proper application of the forfeiture clause in section 2071(b) to retired military officers. Second, the

[1] legislative history of the original statute and its successors is sparse, and no Congressional guidance has been found concerning the definition of the term "office," or the intended breadth of the forfeiture provision. (Letter of July 5, 1989, from Lawrence Lamade to the Honorable Charles Bowsher, at 1.)

Third, in terms of the penalties it imposes, the text of section 2071(b) is vague; the statute fails to specify the intended impact of the forfeiture provision upon retired military officers.

Without precedent, legislative history or clear statutory language—the typical guideposts of statutory interpretation—the task of applying section 2071(b) to Colonel North is made exceptionally difficult. The judiciary alone has the expertise to resolve issues of this nature. Without first receiving guidance as to the meaning of the statute from the courts, congressional action will be taking place in a vacuum.

A judicial ruling on the meaning of section 2071(b) should be obtained before the Congress decides what changes, if any, should be made to the statute.

c. It is inappropriate for this committee to speculate as to the intended application of 18 U.S.C. 2071(b)

This committee has been asked for its view on whether section 2071(b) was intended to apply in this circumstance. We believe that it would be inappropriate for this committee to speculate as to the intended application of section 2071(b). Chief Justice John Marshall, defining the independent roles of the federal branches, wrote:

It is, emphatically, the province and duty of the judicial department, to say what the law is. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

Congress enacts legislation. In the realm of criminal law, this includes defining offenses and setting forth the penalties for their violation. Under our constitutional scheme, the judiciary is charged with interpreting the law, as enacted by Congress, and applying it in particular cases. This task of determining the case-specific meaning of previously enacted legislation is the essence of "say[ing] what the law is." The substantive precedent and procedural rules governing courts make the judiciary uniquely qualified for this task.

This committee has been requested to determine whether section 2071(b) was intended to apply to retired military officers like Colonel North. Congress and its committees are, however, poorly equipped to interpret the meaning of statutes. The judicial machinery employed by courts in deciphering legislative intent is not available to the legislative branch. Congress long ago defined the

crime of destroying government documents and described the penalties for its violation. That was the extent of Congress's legislative function. What is now required is the interpretation of the statute and its proper application to Colonel North. Congress should not attempt to speculate as to how the courts will answer this question.

Arguments that Congress has some special insight into the intended application of section 2071(b) are without merit. The present version of this law was enacted in 1948. As Professor Shane succinctly stated in his testimony:

[T]his Congress is not better situated than a court to speak to the intent of the original law, which of course, was not enacted by this Congress. (Testimony of Peter Shane, October 18, 1989, at 24.)

During the hearing, Senators Hatch and Specter stressed the importance of honoring the long-established rule of statutory construction that penal statutes should be strictly construed against the government and in favor of the persons against whom penalties are to be imposed. The goal of interpreting section 2071(b) consistent with this rule of construction can best be accomplished by obtaining a judicial ruling prior to congressional action. Without an authoritative decision from the courts, there is no final application of the statute for Congress to critique.

Section 2071(b), enacted in 1948 by Congress, has not yet been applied to retired military officers. According to our constitutional scheme, the appropriate sequence of events is for the judiciary to first determine "what the law is"; and then, for Congress to amend the law if it believes such action is necessary.

2. The equitable concerns raised by the termination of a retired officer's pay under 18 U.S.C. 2071(b) are best addressed through general legislation

a. All persons subject to the forfeiture provision of 18 U.S.C. 2071(b) should be treated in an equitable manner

Colonel North's conviction under section 2071(b) is unique and presents a number of questions of first impression: first, whether a retired military officer holds an office within the meaning of section 207(b); second, whether the public interest served by the forfeiture provision of section 207(b) would be advanced by terminating the retirement pay of military officers; and third, whether the continuing responsibilities and obligations of retired military officers legitimately distinguish them as a separate class under the statute.

Chief among these questions, however, is the overall issue of equity: Is it fair to apply the forfeiture provision of section 2071(b) to retired military officers, resulting in the loss of retirement pay, even though that forfeiture provision has no application to other retired government employees? At the hearing, Senator Grassley spoke against the creation of a double standard under section 207(b): one rule for retired military officers and another for all other persons in violation of the law.

The question of equitable treatment under section 207(b) must be addressed. Whether or not there are valid reasons for treating re-

tired military officers as a special class, it is clear that Congress must examine the fairness of construing the forfeiture provision in the manner proposed by GAO. In doing so, it will be important to balance Senator Grassley's concern about a double standard against the special status attributed to retired military officers under other forfeiture provisions.

Arriving at an equitable rule, or set of rules, for the forfeiture of retirement pay requires the consideration of a variety of diverse issues: To what extent does the expectation of a pension serve as an incentive for military service or civilian government employment? If the forfeiture provision of section 2071(b) were interpreted to apply to retired military officers, what impact, if any, would there be on the morale of our military personnel? Are the military services in favor of maintaining the common-law distinction between retired military officers and other retired officers? Should there be a single rule on pension forfeiture covering all civilian and military officers? If so, should disqualification from office result in pension forfeiture for all officers, or for none?

If a rule, both equitable and practical, is to be arrived at, then the appropriate congressional committees—Armed Services, Governmental Affairs and Government Operations—must apply their expertise to a study of these issues.

Once the best general rule is determined, the question of retroactivity can be decided. If a new general rule mandated the payment of pensions regardless of disqualification from office, a decision would have to be made as to whether it applied to those who have already been denied pensions because of their removal from office. Conversely, if pension forfeiture were to be imposed in all cases of disqualification, would it apply to those who have been removed from office but have retained their pensions? These questions must be resolved in a manner that will produce an equitable result for all those effected.

b. A private bill is not the best way to remedy inequities in the application of 18 U.S.C. 2071(b)

The issue of equity should be addressed by general legislation. If Congress were to determine that it is unfair to subject retired military officers to the forfeiture provision of section 2071(b), a private bill would not remedy that situation. An ambiguity in a statute, recognized to produce inequitable treatment, can be corrected only by revising that statute categorically.

Each of the constitutional scholars testifying before the committee subscribed to this view. In response to a question from Senator Grassley, Professor Shane stated:

The concern that you raise for equity is an important consideration for Congress in passing legislation, and to my mind I would simply urge you to consider whether that isn't the strongest argument against private relief as opposed to a categorical response. If Congress enacts [a private law] and we have the misfortune or another military officer violating the exact same statute who is a graduate of West Point [as opposed to the Naval Academy] but who served in Vietnam and won the same decorations, that

person would be dependent on the goodwill of Congress again to come forward and give him equal treatment by passing yet another bill. That is the problem that private legislation always poses. (Testimony of Peter Shane, October 18, 1989, at 36.)

A private law restoring Colonel North's retirement pay would not revise section 2071(b) and would do nothing to clarify whether retired military officers are covered by the forfeiture provision of the statute. Other individuals, finding themselves in identical circumstances to those now confronting Colonel North, would not be effected by a private bill.

Under the bill before the Senate now, a retired officer with a service record identical to Colonel North's would be denied his pension merely because he attended West Point instead of the Naval Academy. This would only exacerbate the existing inequity in the law—not rectify it.

In his opening remarks, Professor Hickok also indicated his preference for general legislation:

The option of Congress expressing its own understanding of the statute strikes me as the more appropriate strategy to pursue. . . . [I]t requires the members of this committee and Congress to move beyond specific concerns of the fate of Lieutenant Colonel North so that the larger issues may be addressed, bearing in mind, of course, that Lieutenant Colonel North's future is implied by how those issues are addressed. (Testimony of Eugene Hickok, October 18, 1989, at 20.)

Should Congress determine, after further review, that application of the forfeiture provision of section 2071(b) to retired military officers is inequitable, the proper course of action lies in general legislation aimed at revising the statute as Congress deems appropriate. A private bill, in contrast, would fail to remedy any discovered flaws in the existing statute.

II. POSITION OF SENATORS THURMOND, HATCH, SIMPSON, GRASSLEY, SPECTER, AND HUMPHREY

A. SUMMARY

It must be made clear that the Judiciary Committee had one hearing and issued a report. There was no committee discussion and *no vote* on these issues.

After having held a hearing, and after having considered the legal and equitable issues raised, Congress should enact legislation to restore Colonel North's retirement pay. Members of the Senate Judiciary Committee find that the forfeiture provision of 18 U.S.C. 2071(b) was never intended to deny retired military officers their retirement pay. Therefore, the forfeiture provision of section 2071(b) does not apply to Lt. Col. Oliver North and it would be appropriate for the Senate to consider legislation to restore the retirement pay of Lieutenant Colonel North.

Because the statute in question is arguably ambiguous, as reflected by the testimony of witnesses who appeared before the commit-

tee, it is appropriate for Congress to enact remedial legislation to clarify the scope of application of the statute.

Regarding the equitable issues this case raises, regardless of how one may choose to interpret the statute, Lieutenant Colonel North served his Country honorably for over 20 years. It is simply unfair and unjust to deprive this man of the retirement pay he earned after such a brilliant and dedicated military career. Congress, if it so chooses, may, by enacting remedial legislation, clarify a statute's scope of application. However, pending enactment of any such remedial legislation in this particular case, the retirement pay of Lt. Col. Oliver North should be immediately reinstated and legislation to restore the retirement pay of Lt. Col. Oliver North should be enacted.

1. *It is the opinion of members of the Senate Judiciary Committee that the type of office held by a retired military officer is not the same as that contemplated by the forfeiture provision of 18 U.S.C. 2071(b)*

There is a lack of legislative history concerning the scope of application with regards to section 2071(b). The purpose of the statute is to "preserve the public records and papers from all kinds of spoliation, mutilation or destruction". The public interest served by the forfeiture provision of the statute is to ensure the security of documents by denying those convicted under the statute access to such records and papers. However, since a retired military officer is relieved of all duties upon retirement, the public purpose underlying this statute would not be served by forfeiture of the officer's commission. A retired military officer arguably holds an office with no responsibilities. In this capacity he receives a salary which is reduced to reflect his lack of responsibilities. Being an officer with reduced responsibilities, he cannot gain access to the sorts of documents protected under section 2071(b); therefore, his forfeiture of office is not necessary to securing public documents. Moreover, if a retired military officer is convicted under section 2071(b), it is unlikely that he would be called back to active military duty. Therefore, no useful purpose would be served by applying the forfeiture provision of section 2071(b) to retired military officers.

The common meaning of the term "office" connotes one who exercises significant authority under the laws of the United States. *Buckley v. Valeo*, 424 U.S. 1, 125-6 (1976). In determining the meaning of any act of Congress, unless the context indicates otherwise, "officer includes any person authorized by law to perform the duties of the office". 1 U.S.C. 1 (1982). According to U.S. Navy regulations, a retired military officer exercises no authority pursuant to the laws of the United States. Therefore, they should be treated similar to retired civilian officers or employees of the Federal Government, both of which, it has been determined, do not hold office for purposes of 2071(b), and, therefore are not subject to forfeiture of retirement pay based upon a conviction under 2071(b).

Based upon the above analysis, it is the opinion of members of the Senate Judiciary Committee that a retired military officer does not forfeit his retirement pay as a consequence of a conviction under 18 U.S.C. Sec. 2071(b).

2. *It is the opinion of members of the Senate Judiciary Committee that the legislative intent of 18 U.S.C. 2071(b) was to apply to "officers of the United States", but that no definition of officers was provided, so that application of the forfeiture provision of this statute is ambiguous and uncertain, and analogous forfeiture provisions do not contemplate the forfeiture of a retired military officer's retirement pay*

For at least the last 30 years, Congress has protected the retirement pay, once earned, of all former Federal employees, including retired military officers, from forfeiture unless they are convicted of offenses for which forfeiture of pay is expressly provided. As originally drafted, the analogous "Hiss Act", 5 U.S.C. 8311 (1954), mandated the forfeiture of retirement pay for Federal civilian employees and military officers upon the conviction of any felony. In 1961, Congress, clarified its intention that retired pay only be lost by those who commit specified offenses. Activity that would result in a conviction under section 2071(b) is not one of the offenses for which the "Hiss Act" requires a forfeiture of retired pay. Additionally, forfeiture under any of the enumerated offenses of the "Hiss Act" is self executing based upon the clear intention of Congress. Those convicted under the statute "may not be paid annuity or retired pay". Thus, a plain reading of the "Hiss Act" makes clear its scope of application. A far different conclusion would have to be reached upon examining the language of section 2071(b). Everyone agrees that section 2071(b) is ambiguous on its face. Therefore, by examining an analogous statute, it is possible to conclude that application of the forfeiture provision to retired military officers was specifically deleted by an affirmative act of Congress.

It is the opinion of members of the Senate Judiciary Committee that the legislative intent as to the scope of application of the forfeiture provision 2071(b) is arguably ambiguous. However, by reviewing an analogous statute, it can readily be determined that Congress has already spoken on this issue and, therefore, the forfeiture provision of section 2071(b) should not apply to a retired military officer. Thus, Lieutenant Colonel North should have his retirement pay reinstated. Congress, if it chooses, may seek to clarify the scope of application of section 2071(b), however pending such an inquiry, it is the judgment of members of the Senate Judiciary Committee that the retirement pay of Lieutenant Colonel North should be immediately reinstated.

3. *It is the opinion of members of the Senate Judiciary Committee that it is clearly inequitable for the forfeiture provision of section 2071(b) to be construed to apply to retired military officers when retired civilian officers and retired employees of the Federal Government are not subject to this statute because they have been deemed to no longer hold "office"*

One issue discussed in committee was whether a retired military officer holds "office" for purposes of the forfeiture provision of 18 U.S.C. 2071(b). Although the statute provides no definition of "office", we can look to general legislative definitions to develop an understanding of what was most likely contemplated when 18 U.S.C. 2071(b) was drafted. Title 5 of the U.S. Code defines "officer"

as one who is "engaged in the performance of a Federal function under authority of law or an executive act". Once retired, Federal civilian office holders no longer perform any Federal function, and by definition, no longer hold "office", 5 U.S.C. 2104 (1982). Retired military officers are currently deemed to retain their status as commissioned officers. However, there is a significant difference between commissioning status and duty status. The Comptroller General defined elements of holding civil office, "the specific position must be created by law; there must be certain definitive duties imposed by law on the incumbent, and they must involve the exercise of some portion of the sovereign power", 29 Comp. Gen. 363, 366 (1950). Retired military officers exercise no authority pursuant to the laws of the United States. They are distinguished from active-duty officers and from civil office holders by the absence of duties. Therefore it is questionable, based upon the above definitions, that retired military officers would hold "office" for purposes of sec. 2071(b).

By far, the most inequitable result of construing the forfeiture provision of sec. 2071(b) to deprive retired military officers from receiving their retirement pay, concerns the treatment of other categories of convicted felons. It is disgraceful that in accordance with a special provision of the 1988 Anti-Drug Abuse Act, convicted drug dealers who were ever employed by the Federal Government, remain eligible for retirement pay, welfare, Social Security payments, veterans benefits, public housing and other similar benefits. In addition, former members of Congress who have been convicted of felonies or ethical misconduct remain eligible to receive their retirement pensions.

As members of the Senate Judiciary Committee we believe it is an outrage and completely inequitable for a decorated combat veteran who served his country honorably for 20 years to be denied the retirement pay he earned, and yet at the same time, allow convicted drug dealers to receive Federal benefits in the form of retirement pay.

Because retired military officers have no duties, it is inequitable to single them out for unique treatment when applying the forfeiture provision of 2071(b), especially when retired civilian officers, former Federal employees, and former Congressmen are exempt from this same forfeiture provision.

4. *It is the opinion of members of the Senate Judiciary Committee that while we strongly believe that the appropriate interpretation of section 2071(b) should not deny Lt. Col. Oliver North his retirement pay, it is entirely appropriate for Congress to clarify any arguably ambiguous statute with remedial legislation*

The constitutional scholars who testified at the committee hearing unanimously supported the idea of Congress simply enacting remedial legislation to clarify the current ambiguity that exists regarding the scope of application of sec. 2071(b). When asked by Chairman Biden if there was any dispute as to Congress' ability to enact remedial legislation, the constitutional scholars replied:

Mr. HICKOK. Not as far as I'm concerned. I think you have that authority.

The CHAIRMAN. Professor Shane?

Mr. SHANE. I wouldn't see any problem with that sort of categorical legislation.

It is our recommendation that if Congress chooses to clarify section 2071(b), that it explicitly state that the retirement pay of retired regular officers of the armed forces of the United States shall not be forfeited under section 2071(b). Again quoting Professor Shane:

It is one thing for this Congress to express its intent. I mean, if this Congress intends that retired military officers not lose their pay under 2071, it is, of course, perfectly entitled to express that intent through a statute. There is no disagreement between us on that.

There is a need to determine the intent of Congress with regard to the treatment retired military officers under this statute. Law making is the responsibility of this institution. Although the judicial branch has authority to interpret the law, how could a judge be better qualified to determine the will of Congress than Congress itself? It is important for the Congress to settle this issue, not just because of Lieutenant Colonel North, but because it is Congress' duty to write the laws, establish policy, and clarify any ambiguity in the law.

5. *It is the opinion of members of the Judiciary Committee that regardless of the opinion reached by the general counsel of the General Accounting Office it is appropriate for Congress to enact remedial legislation to clarify an ambiguous statute*

The General Counsel of the General Accounting Office reviewed section 2071(b) and takes the position that if retired military officers were not intended to be included within the forfeiture provision, that Congress would have specifically exempted them. This conclusion was adopted from a statement made in a preliminary memo drafted by the General Counsel of the Navy. The General Counsel of the Navy never took a position in this memo, but simply requested a decision from the General Accounting Office and discussed some of the possible legal conclusions either side could draw. At the October 18th hearing, the General Counsel of the Navy supported the conclusions of the Judge Advocate General of the Navy who without qualification asserted that a conviction under 2071(b) does not operate to deny a retired military officer his retirement pay. Therefore, the G.A.O. is left with the dilemma of having adopted a position that has since been refuted by its author.

An examination of the position paper of the G.A.O. reveals acknowledgements that "retired officers have no official duties and therefore there is no reason to include them within the scope of the forfeiture provision of section 2071(b) and similar statutes". The General Counsel of the G.A.O. then further admits: "A reading of subsection 2071(b) that requires retired regular officers who violate it to forfeit their retired pay but imposes no such requirement on retired reservists or civilians is sufficiently anomalous to raise doubts as to whether Congress intended that result".

The General Counsel of the G.A.O. concedes that at the very least the statute in question is ambiguous. It is a long established rule of statutory construction that penal statutes should be strictly

construed against the government and in favor of the persons on whom the penalties are sought to be imposed. The rule rests on the concern that expansive interpretation of the statutes might lead to penalties not intended by the authors of the legislation. It is a means of ensuring fairness to all persons subjected to the laws of the United States by requiring statutes to give a clear and unequivocal warning to all persons concerning actions that would expose them to liability for penalties. Employing such a strict standard, in our opinion, would mean that retired regular officers of the military would not be subject to forfeiture of their retirement pay absent clear language to that effect in the statute.

In light of the fact that the G.A.O. in its own position paper readily admits its unsure as to whether section 2071(b) applies to retired military officers, it is the opinion of members of the Judiciary Committee that remedial legislation to clarify the scope of application of section 2071(b) is certainly warranted.

6. *It is the opinion of members of the Judiciary Committee that pending the enactment of remedial legislation to clarify the ambiguity contained within section 2071(b), it is appropriate for Congress to immediately enact legislation to restore Lt. Col. North's retirement pay*

If Congress so chooses, it may pass special legislation that would exempt Lt. Col. Oliver North from that aspect of section 2071(b) that has been implied by some to require him to forfeit a retirement pay which he earned. There is much precedent for this kind of legislation. According to Professor Hickok:

There is a rich history of Congress reacting to previous decisions either by courts or Congress itself in trying to provide compensation for the victims of bad laws.

In the early 1800s Congress looked at the alien and sedition laws which it had passed which limited severely freedom of speech; looked at those laws, realized they were a mistake, and passed legislation compensating specific individuals who had been found guilty and had been punished based on those laws.

So Congress has the power to do it, the authority to do it. It doesn't exercise it frequently primarily because I think Congress does a pretty decent job of writing statutes that aren't that vague. But at times it needs to, and this might be one of those times.

As previously stated, although it is our position that section 2071(b) does not apply to retired military officers and therefore would not apply to Lt. Col. Oliver North, pending the enactment of remedial legislation to clarify the statute, it is entirely appropriate for Congress to enact legislation to restore Lieutenant Colonel North's retirement pay.

III. ADDITIONAL VIEWS OF SENATOR STROM THURMOND

On May 4, 1989, Lt. Col. Oliver North was convicted of destroying government documents. On July 5, 1989, Lieutenant Colonel North was sentenced to perform 1,200 hours of community service and pay a fine of \$150,000. The statute under which Lieutenant Colonel North was convicted contains a provision that some argue should operate to deny a retired military officer his pension. The Senate recently passed legislation which requires the Judiciary Committee to hold a hearing and report back its findings as to whether the statute in question was intended to apply to retired military officers and whether Lieutenant Colonel North is deserving of his retirement pay.

Regarding the specific statute in question, section 2071(b) of Title 18 of the U.S. Code, provides in part that "whoever willfully and unlawfully destroys a government document . . . shall forfeit his office and be disqualified from holding any office under the United States". Some conclude that based upon the language of this statute, Lt. Col. Oliver North and his family should be denied his retirement pay and medical benefits. I disagree with this conclusion. However, this is case of first impression as to whether Lieutenant Colonel North "holds office" as originally contemplated by this particular statute.

I have carefully reviewed the statute in question along with interpretations of it by appropriate government attorneys. The report issued by the Judge Advocate General of the United States Navy concludes that the type of office held by a retired naval officer, such as that held by Lieutenant Colonel North, is not the same as that contemplated by the forfeiture provision of section 2071(b). The Judge Advocate General went on to affirmatively rule that a retired officer convicted of an offense under this statute does not forfeit his commission, nor does he lose his retirement pay as a consequence of a conviction under this statute. After a review of the statute in question, I support the opinion of the Judge Advocate General of the Navy, an opinion shared by the General Counsel of the Navy, that section 2071(b) does not apply to retired military officers and therefore does not apply to Lt. Col. Oliver North.

As drafted, some take the position that section 2071(b) is ambiguous on its face. The legislative history does not indicate what Congress intended by the phrase "office under the United States". While I strongly believe that the appropriate interpretation should not deny Lieutenant Colonel North his pension, it is appropriate for Congress to clarify any ambiguous statute with remedial legislation. However, pending clarification of this statute, it is clearly unfair to deny this man his retirement—a retirement he earned after 20 years of dedicated service to this country.

In closing, regardless of how one chooses to interpret the statute, the bottom line is that Lt. Col. Oliver North served his country

honorably for over 20 years. Lieutenant Colonel North was an outstanding member of our Armed Forces. He participated in over 70 combat actions earning the Silver Star, the Bronze Star for bravery, and two Purple Heart commendations for injuries sustained in combat, various Navy commendation medals, and the Vietnamese Cross of Gallantry with Silver Stars. It is simply unfair and unjust to deprive this man of the retirement pay he earned after such a brilliant military career.

IV. ADDITIONAL VIEWS OF SENATOR ORRIN G. HATCH

I believe it is clear, as a matter of law, that Lt. Col. Oliver North (ret.) should receive the pension to which his 20 years of service to our Nation entitle him. After reviewing the reports in this matter and hearing the testimony of witnesses at the hearing of October 18, I am convinced that the basis on which the General Accounting Office has determined that Colonel North was not entitled to his pension is plainly insufficient. The better view, and only logically defensible position under the applicable law, is that initially reached by the Department of the Navy: Colonel North's pension should be reinstated.

No Federal statute exists saying that a military pension is to be forfeited upon conviction of any crime for which North has been found guilty. However, some have argued that 18 U.S.C. sec. 2071(b), which provides that anyone convicted of destroying government documents in his possession shall be prohibited from holding "any office under the United States," is a lawful basis for denying him his pension. Colonel North does stand convicted of violating that statute, but there is nothing in the phrase "office under the United States" which implies that forfeiture of an earned pension, or retirement pay of any kind, is a penalty for violating section 2071(b).

If Congress had intended to require forfeiture of a pension as a penalty for violating section 2071, it is logical to ask why Congress did not use language relating to "retired pay," "pension," or, perhaps, "retirement benefits." That has been the custom of Congress whenever it has statutorily enacted a forfeiture of a government pension in the past.

There are nearly 40 offenses under the Federal code for conviction of which it is clear that the defendant will forfeit his pension. Those offenses are listed in section 8312 of title 5—the so-called Hiss Act. Oliver North was convicted of none of those offenses. It is possible to state that persons convicted of the offenses enumerated in section 8312 will lose their pensions because that section states that the convicted individuals "may not be paid annuity or retired pay." The Hiss Act does not say that those persons shall forfeit their "office."

When Congress wants to deny someone his or her pension, it knows how to do it. It passes a statute that says don't pay this category of individual his or her retirement pay. It doesn't deny someone a well-earned pension by the circuitous route of saying this person shall forfeit his or her "office" and hope that those administering the law can somehow read between the lines and divine that when Congress said "office" it actually meant to say "retirement pay."

No witness cited any case in which section 2071's prohibition on retention of Federal "office" has ever been interpreted to require a

forfeiture of retirement pay. Nor has the committee's attention been drawn to any other provision of Federal law in which Congress has established a pension forfeiture provision through use of the phrase "office under the United States." It is clear, instead, that a special rule designed for the sole purpose of denying Oliver North his pension was applied in this case without a single past precedent for such application.

The basic legal principles involved in this case are straightforward and point to only one conclusion:

First, all agree that the plain language of section 2071(b) is insufficient, without additional interpretation, to resolve this issue.

Second, all the witnesses agreed that no case interpreting 18 U.S.C. section 2071(b) has ever said that the word "office" does or does not include pension or retirement pay of any sort.

Third, the well-established rule of statutory construction that criminal statutes and laws imposing fines or penalties have to be strictly construed—with all ambiguities resolved in favor of the defendant and against punishment—must be applied in this case, because 18 U.S.C. sec. 2071(b) imposes criminal penalties. (See e.g., *Dowling v. United States*, 473 U.S. 207, 214 (1985).)

From these principles, the conclusion ineluctably follows that Oliver North is entitled to his pension until some case or other positive statement of law says that he is not. It should not be his duty to go to court to resolve this controversy, especially where the law is so clearly in his favor. He is entitled, as are all criminal defendants, to have the laws setting the punishment for his offense strictly construed in his favor. Any ambiguity—and everyone arguing for withholding the pension concedes ambiguity—must be resolved in his favor.

The bill referred to this committee, originally introduced on August 4, 1989, as Amendment No. 694 (Cong. Rec. S10118) by Senator Helms, would effectively restore Colonel North's pension. The arguments heard in committee questioning not the wisdom but the constitutional power of the Senate to pass such a bill were based on no authority and are clearly contradicted by the congressional tradition of passing private relief bills, or other bills of a limited nature, where it is necessary to do justice. This is such a case.

Even if the law were not so clearly in Colonel North's favor, I believe that Congress would want seriously to consider righting the wrong that would result from denying this soldier his well-earned pension. Colonel North is a graduate of the U.S. Naval Academy. In 1968, he was commissioned a Second Lieutenant in the U.S. Marine Corps. He was immediately sent with the Third Marine Division to Vietnam, where he saw combat in more than 70 actions. While serving in Vietnam, and during the next 20 years of his distinguished service in the Marines, he was awarded numerous citations, including the Purple Heart Medal (twice), the Navy Commendation Medal with Combat "V" (three times), and the Silver Star—the second highest medal which our Nation can bestow.

Can there be any doubt that this soldier has earned his pension?

V. ADDITIONAL VIEWS OF SENATOR CHARLES E. GRASSLEY, COMMITTEE ON THE JUDICIARY, ON 18 U.S.C. 2071(b)

On October 18, 1989, the Senate Judiciary Committee conducted a hearing concerning title 18 U.S.C. section 2071(b). The committee was ordered to report ¹ back to the Senate by November 1.

This report was directed to contain the following determinations:

1. Whether the legislative intent of 18 U.S.C. 2071(b) was to require the forfeiture and disqualification from "office under the United States" to apply to officers, both active and retired, in the Armed Forces;
2. Whether the legislative intent of 18 U.S.C. 2071(b) was to deprive persons convicted under this section from receipt of their Federal pensions;
3. Whether 18 U.S.C. 2071(b) applies to other retired Government employees, and if not, whether such is equitable;
4. Whether action on any remedial legislation for Lt. Col. Oliver North, relating to the denial of his pension as a result of his conviction under 18 U.S.C. 2071(b) is appropriate in lieu of litigation, or whether it is preferable for this issue to be determined in the courts;
5. Whether remedial legislation for Lt. Col. Oliver North is warranted under the application of 18 U.S.C. 2071(b), considering the opinion of the General Counsel of the General Accounting Office dated July 31, 1989;
6. Whether any other legislation relating to the application of 18 U.S.C. 2071(b) is appropriate.

It is important to understand that our hearing was not held to relitigate the case against Colonel North. Similarly, the purpose of this inquiry was not to debate political issues or foreign policy.

Rather, this issue addresses questions of legislative history and statutory intent. Further, we also must decide whether the statute is ambiguous and if so, whether Congress should clarify the statute's ambiguous language.

I appreciate the sentiment against awarding a pension to one convicted of a Federal crime, but again, the issue is what the stat-

¹ The so-called "majority report" devotes nearly its entire discussion to a criticism of a "private relief" bill for Lt. Col. Oliver North. Of course, private relief is one of a range of possible options.

First, I note that inasmuch as the committee never has publicly taken a position on this matter, it is presumptuous for any report to be styled as "majority" views. The committee's business ought to be done in public, yet no votes on private relief or any other bills were taken before this report was issued.

Second, the report is of only marginal utility to the full Senate because of its evasive treatment of the critical issue facing us: How to resolve the acknowledged ambiguity of 18 U.S.C. 2071(b). Indeed, the "majority report" makes the unusual suggestion that Congress—when faced with an ambiguous statute—should stand aside and allow the judiciary to speculate on legislative intent from the laws barren history. I strain to imagine another instance where this committee has so willfully abdicated its legislative responsibility in favor of deferring to a court's redrafting of the law.

ute intends, not that Oliver North was convicted and must pay for his crime. North has been convicted and sentenced. However, if 18 U.S.C. 2071(b) is not in fact a pension forfeiture provision, then to interpret it to take away Colonel North's pension just because some believe he deserves a harsher punishment is entirely inappropriate.

Title 18 U.S.C. 2071(b) provides:

Whoever, having the custody of any such record, proceeding, map, book, document, paper, or other thing, willfully and unlawfully conceals, removes, mutilates, obliterates, falsifies, or destroys the same, shall be fined not more than \$2,000 or imprisoned not more than three years, or both; and *shall forfeit his office and be disqualified from holding any office under the United States.* (emphasis added)

The fact is that there is little legislative history on this provision. There are no cases on point; this is a case of first impression. Furthermore, analysis of this statute reveals it is ambiguous and needs clarification. In my judgment, Congress should—while it has the opportunity—clarify the law.

I. THE FORFEITURE PROVISION OF 18 U.S.C. 2071(b) IS UNCLEAR

This matter turns upon the definition of the term "office" as used in the statute. The statute does not affect the "office" status of those who commit the same crime under 2071(b) but are either retired reserve or retired civilian officers. This is true because, according to the Navy Judge Advocate General, neither retired reserve nor retired civilian officers are considered to hold office under the United States when they retire; they cannot be involuntarily recalled to serve as can retired regular officers.

The Attorney General formally expressed the opinion that the purpose of forfeiture provisions like the one in 2071(b) is not punishment, but rather protection of the public from any further misconduct. 38 Op. Atty. Gen. (1936). According to the Attorney General, the statute is designed to ensure that a person who violates the statute no longer will have access to Government documents and information.

Accordingly, the statute serves the important public policy of protecting Government information. Retired regular officers are dissimilar to retired reserve and civilian officers because only retired officers may be recalled to service (and thus exposed to Government information), while retired reservists and civilians cannot. This is why retired regular officers may be treated differently under the law.

However, there is no public policy reason to explain why retired regular and retired reserve officers would not be similarly situated for purposes of entitlement to Federal pensions. There is no reasonable explanation to justify forfeiture of pensions for retired regular officers, but not retired reserve and civilian officers. Even the General Accounting Office, in a letter dated July 31, 1989, from James Hinchman, GAO General Counsel, to Lawrence Lamade, General Counsel, Department of the Navy, concedes that "a reading of sub-

section 2071(b) that requires retired regular officers who violate [the section] to forfeit their retired pay but imposes no such requirement on retired reservists or civilians is sufficiently anomalous to raise doubts as to whether Congress intended that result."

The GAO concludes in their letter of July 31, that Colonel North, holds an office "at least for some purposes." Significantly, however, GAO states that this conclusion "does not answer the question of whether a retired regular officer holds an office within the meaning of subsection 2071(b)."

Nonetheless, GAO states that retired regular officers are still considered to be in military service. The pension they receive is not for prior service, but is reduced pay in return for reduction responsibilities and obligations, including possible recall. For this reason, GAO finds it unlikely that a retired regular officer convicted under section 2071(b) could thereafter exercise any responsibilities as an officer of the United States and "certainly the officer could not be recalled to active duty." Because GAO claims that a retired regular officer's pay cannot be separated from these responsibilities and obligations it recommended that the Department of the Navy suspend Colonel North's earned pension pending litigation of this case.

GAO's view, however, is problematic. Accepting GAO's literal interpretation of 2071(b), (that when regular military officers retire they take their "office" with them), may create constitutional problems, because a retired regular officer could not hold a congressional office without violating Article I, section 6 of the United States Constitution. Article I, section 6 states in part:

* * * no Person holding any Office under the United States, shall be a Member of either House during his continuance in Office.

There are a number of current members of Congress, from both parties, who are retired regular officers. If the GAO's interpretation is followed, will we next considered a private relief bill for some of our colleagues who have served this Congress? Such unanswered questions underscore the ambiguity of the statute.

II. FAIRNESS WEIGHS IN FAVOR OF REMEDIAL LEGISLATION

At the hearing, we heard testimony from Professors Peter M. Shane and Eugene W. Hickok, Jr., both of whom agreed that a constitutionally sound statute could be enacted that amends section 2071(b) and applies retroactively to reinstate Colonel North's pension.

For example, Professor Shane testified:

That Congress was alerted to the issue by the North case is not itself constitutionally objectionable . . . If Congress amended section 2071(b) in a general way, Lieutenant Colonel North would not be the beneficiary of private legislation in a thin disguise; he would instead be one of a possible class of beneficiaries created by a categorical change in the laws of the United States.

Professor Hickok spoke to the unfairness of a change in the accepted rules of statutory construction in this case:

It has long been an established rule that penal statutes should be strictly construed against the government and in favor of the persons on whom the penalties are sought to be imposed. This rule rests on the concern that expansive interpretation of the statutes might lead to penalties not intended by the authors of the legislation.

To strictly construe an ambiguous statute against a criminal defendant would be doubly unfair.

Moreover, in our public law, this case serves to illustrate yet another double-standard. At this moment there are former members of Congress convicted of such felonies as bribery and conspiracy, but still receiving pensions. The Washington Post reported in December 1980, that former Representative Frank Thompson, convicted of bribery in the ABSCAM investigation, receives an estimated \$48,530-a-year government pension.

Former Representative Charles Diggs, convicted in 1978 for pay-roll kickbacks, was awarded his \$38,232-a-year pension even though at the time he owed the United States treasury \$40,000. Former Representative John Jenrette, also convicted of a felony, will receive his pension for the 6 years he spent in office during which he committed bribery. There are other examples.

These members of Congress, and others, have violated the public trust yet still receive their Federal pensions. In addition, these convicted former members enjoy such benefits as floor privileges, and use of the members' gym, barber shop, library, dining room, and parking lot.

III. RECOMMENDATION: CONGRESS SHOULD CLARIFY 2071(b) SO THAT RETIREMENT PAY NOT BE SUBJECT TO FORFEITURE

Because Congress has created an ambiguous statute, it is obliged to clarify the terms. It is Congress' role to legislate and it is therefore wholly improper to pass the buck to the judiciary to imagine congressional intent. To abdicate our duty is not prudent as a constitutional matter or as a policy matter.

Professor Hickok recommends that Congress explicitly state that the retirement pay of retired regular officers of the armed forces of the United States shall not be forfeited [by operation of] section 2071(b). This amendment would in his words "clarify the law by moving it in the direction I think was probably intended by those who supported it initially."

For all of the above reasons, I agree with Professor Hickok and urge my colleagues to clarify the meaning of 18 U.S.C. 2071(b), and to apply it to the case currently before us.

CHUCK GRASSLEY.

VI. ADDITIONAL VIEWS OF SENATOR HUMPHREY

While I agree with many of the points raised in the views of Senator Thurmond, I would stress the following key points in assessing the issues raised by the termination of Lt. Col. Oliver North's retirement pay.

It is not at all clear that the applicable provisions of 18 U.S.C. Section 2071(b) require the termination of retirement-pay in the case of a retired military officer. Nothing in the language of the statute or the legislative history dictates that result, and the Judge Advocate General of the Navy has expressed the view that the statute does not operate to deny a retired military officer his retirement pay. The forfeiture provision of section 2071 is mainly concerned with excluding persons convicted under that statute from positions of government responsibility, to assure against recurrence of the practices covered by the statute. Its purpose is remedial, not punitive.

Accordingly, it seems inequitable and arbitrary to apply this ambiguous provision to deprive Colonel North of retirement pay he earned by virtue of his long years of dedicated and courageous service in the U.S. Marine Corps. Such a result is unnecessary and irrelevant to the statute's objective. Moreover, it results in disparate treatment in the case of retired military officers—since retired civilian government officers are not subject to section 2071 and would not forfeit their retirement pay under these very circumstances.

It is also significant that section 2071 is a criminal provision, and it is a well-stated principle of law that such provisions must be strictly construed—i.e., ambiguous provisions should be construed in favor of the defendant. Since all concede that section 2071 is at best ambiguous, and since there is no legislative history indicating that Congress intended it to result in forfeiture of retirement pay in the case of a retired military officer, the most basic legal principles indicate that section 2071 does not require the forfeiture of Colonel North's retirement pay.

However, Colonel North's retirement pay has been officially withheld and there is no indication that it is likely to be restored by executive or administrative action at this time. Consequently, the Judiciary Committee has been asked for its opinion as to whether the matter would be better resolved by clarifying legislation or by having the matter resolved by the courts. Under the circumstances, the prospect of protracted and costly litigation appears to be a questionable method of resolving the matter. Since the courts would be presented with an ambiguous statute which lacks any significant clarifying legislative history on the issue in question, the courts would ultimately be faced with the same policy questions which Congress would address in considering clarifying legislation. Such policy questions are better resolved by Congress.